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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Amendment of Part 90 of the )  
Commission's Rules to Adopt )  
Regulation for Automatic )  
Vehicle Monitoring Systems )

PR Docket No. 93-61

To: The Commission:

**OPPOSITION OF TELETRAC, INC. TO PETITION  
OF HENNEPIN COUNTY FOR PARTIAL RECONSIDERATION**

Teletrac License, Inc. ("*Teletrac*"), by its attorneys, hereby opposes the petition for reconsideration filed by Hennepin County ("*Hennepin*") in the above-referenced proceeding. Hennepin argues that, because it is a governmental entity and believes that its use of an LMS license could enhance the safety of its citizens, Hennepin should receive the license of its choice for the asking -- without going through competitive bidding -- even if other potential bidders stand ready to compete for that license in the auction. As shown below, there is no support for Hennepin's claim that the statutory "public safety radio services" exemption to the assignment of licenses by competitive bidding gives it such an extraordinary right or empowers the Commission to grant one. In fact, the statutory revisions on which Hennepin rests its claim foreclose the Commission from granting the exemption Hennepin seeks. Teletrac accordingly urges the Commission to reject Hennepin's specious argument promptly.

Congress made clear with the passage of the Balanced Budget Act of 1997 ("BBA") that, with only a few limited exceptions, the Commission should distribute all mutually exclusive

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licenses and construction permits through competitive bidding.<sup>1/</sup> Section 309(j)(1) gives the Commission general authority to grant licenses and permits through competitive bidding.<sup>2/</sup> Congress' passage of the amendment to Section 309(j) cited by Hennepin, represented a policy decision that spectrum auctions best serve the public interest.<sup>3/</sup> As a result, Congress enumerated only a few narrow exceptions to the requirement that mutually exclusive permits or licenses be granted through competitive bidding.<sup>4/</sup> LMS licenses do not fall under any of the narrow exceptions Congress made available.

Hennepin mistakenly relies upon Congress' decision to eliminate the "principal use" standard that prohibited the Commission from auctioning spectrum if the "principal use" did not

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<sup>1/</sup> Balanced Budget Act of 1997, P.L. 105-33, § 3002, 111 Stat. 251 (1997) ("BBA").

<sup>2/</sup> "If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission *shall* grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection." 47 U.S.C. § 309(j)(1) (1998) (emphasis added).

<sup>3/</sup> Balanced Budget Act of 1997, P.L. 105-33, § 3002, 111 Stat. 251 (1997) ("BBA").

<sup>4/</sup> The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission —

(A) for ***public safety radio services***, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that —

(i) are used to protect the safety of life, health, or property; and

(ii) ***are not made commercially available to the public***;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in Section 397(6) of this title.

47 U.S.C. § 309(j)(2) (1998) (emphasis added).

involve the licensee's receiving compensation from subscribers.<sup>5/</sup> Contrary to Hennepin's claims, this statutory change *narrowed* the number of possible exemptions and did *not* create a case-by-case determination. By eliminating the "principal use" standard, Congress restricted the number of services in which licenses could be granted without competitive bidding by more specifically enumerating the types of services eligible for exemptions.<sup>6/</sup> By these statutory revisions, Congress rejected a licensee-by-licensee approach to auction exemptions that would have wreaked havoc on the Commission's competitive bidding process.

Hennepin's claim that it falls under the exception for "public safety radio services" provided in Section 309(j)(2)(A) cannot withstand scrutiny. As adopted in the BBA, Section 309(j)(2)(A) now limits exemption from competitive bidding to categories of services that are

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<sup>5/</sup> Prior to passage of the BBA, the Commission was permitted to distribute permits and licenses through competitive bidding only if: (1) the *principal use* of the spectrum will involve or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for use of the spectrum; and (2) a system of competitive bidding will promote certain policy objectives such as the development and rapid deployment of new technologies, products and services for the benefit of the public; the promotion of economic opportunity and competition ensuring that new and innovative technologies are readily accessible; recovery for the public of the value of the public spectrum; and efficient and intensive use of the spectrum.

<sup>6/</sup> See *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures; Allocation of Spectrum Below 5 Ghz Transferred From Federal Government Use 4660-4685 MHz*, 10 CR 999 (December 31, 1997) ("***The Balanced Budget Act expands the Commission's auction authority.*** Section 309(j)(2) formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the expressed objectives. As amended, Section 309(j)(2) provides that, in cases of mutually exclusive applications, all spectrum is auctionable except licenses or construction permits for (1) public safety services; (2) digital television service given to existing broadcasters to replace their analog license; and (3) non-commercial educational or public broadcast stations. . . . Because ***these legislative changes significantly increase the number of services that will be licensed by competitive bidding***, we believe that adopting uniform competitive bidding rules for all auctionable services is even more necessary").

well defined in the Commission's rules. The statutory language refers to "services," not licenses. Multilateration LMS is not classified as a "public safety radio service," and Hennepin has shown no reason to believe that Congress intended to use the term in a way so much at odds with the Commission's rules and the common understanding of the communications industry as to include a service designed for commercial subscribers. The provisions governing LMS and those governing the "public safety radio service" are found in separate subparts of the Commission's rules.<sup>7/</sup> By design, moreover, LMS is intended to be used to render commercial service to subscribers. The mere fact that a service can contribute to "public safety" does not make it into a "public safety radio service," as Hennepin must argue. (Broadcast radio and television, for example, serve critical public safety concerns through EBS alerts, but are not "public safety services.") Absent a reclassification of LMS by the Commission, it cannot extend Section 309(j)(2) so far beyond the plain meaning Congress provided and render LMS licenses subject to a public safety exemption.

Second, Petitioner's claim for exemption fails to meet the explicit requirement of Section 309(j)(2)(A)(ii), which provides that the Commission may not exempt "commercially available" services from competitive bidding. Multilateration LMS has been and will continue to be made "commercially available" to the public by grandfathered providers and future auction winners. Accordingly, Hennepin has failed to show how the Commission could grant its requested

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<sup>7/</sup> Rules governing Multilateration LMS are found in Subpart M under the heading "Intelligent Transportation Systems Radio Service" while public safety broadcast services are found in Subpart B.

exemption without violating the statute.<sup>8/</sup> Moreover, granting the exemption would be poor policy because, given that service could not be made "commercially available" on the exempted allotment, the general public and commercial entities would be foreclosed from obtaining service using the allotment.

Finally, Petitioner's reliance on the dissent of Commissioners Harold Furchgott-Roth and Gloria Tristani in the case of "Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses" is misplaced.<sup>9/</sup> The Commissioners' dissent was solely concerned with Section 309(j)(2)(C) which addresses qualified noncommercial educational and public broadcast stations.<sup>10/</sup> Here, Petitioner is asking the Commission to grant it a "public safety radio service" exemption for which it does not qualify.

The exception sought by Petitioner fails the explicit directions Congress established.

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<sup>8/</sup> Petitioner's assertion that commercially available service is more costly than if offered directly by public entities is completely unsupported by any empirical data or reasoned analysis. It is difficult to see how it could be less expensive to construct and operate an entire LMS system for a single small group of government users than to purchase services on a commercial system that is supported by revenues derived from the larger population of non-government users subscribing to the service.

<sup>9/</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order, MM Docket No. 97-234, FCC 98-194 (August 18, 1998).

<sup>10/</sup> *Id.*

LMS is *not* a public safety service and it *is* commercially available to the public. Petitioner's late-hour attempt to expand the class of exempted services beyond that dictated by Congress must not be entertained. For these reasons, the Commission must deny the petition.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Petition of Hennepin County For Partial Reconsideration" was sent via hand delivery and first-class mail, postage prepaid, this 5th day of October, 1998 on:

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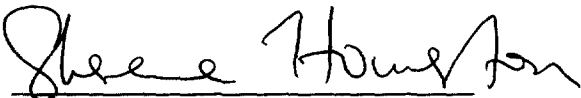
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